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RECORDKEEPING: RECENT RULE AMENDMENTS AND OTHER DEVELOPMENTS

The CFTC recently adopted amendments to Regulation 1.31, in an effort to bring recordkeeping requirements for market participants up-to-date with technological advances. The CFTC has also addressed recordkeeping rules for CPOs and CPAs. In a recent rulemaking, the SEC expanded its requirements that registered investment advisers maintain records relating to performance information distributed to any person. The authors describe these changes and then discuss recent CFTC recordkeeping violation cases involving block trades, EFRPs, and audit trails.

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Recordkeeping is one of the most fundamental obligations to which market participants must adhere, whether they are registered with the U.S. Commodity Futures Trading Commission (“CFTC” or “Commission”) or whether they are non-registrants, such as end-users and exchange members. Without the maintenance of proper records by market participants, regulators will find it difficult to verify compliance with regulatory requirements by market participants or to conduct investigations, and market participants will find it difficult to demonstrate compliance with regulatory requirements, all of which may increase the likelihood of enforcement actions from recordkeeping failures. Thus, it is critical for market participants to know not only the types of records that they must retain, but the form,

manner, and duration of their retention obligations. Moreover, if a CFTC registrant is also required to be registered with the Securities and Exchange Commission (“SEC”), additional recordkeeping obligations apply under the SEC’s rules.

The CFTC recently adopted amendments to CFTC Regulation 1.31, which were intended to modernize the “form and manner” requirements applicable to records required under the U.S. Commodity Exchange Act (“CEA” or “Act”) and CFTC regulations. The CFTC has also been active with respect to recordkeeping requirements in other contexts. For example, it issued no-action relief to permit commodity pool operators (“CPOs”) and commodity trading advisors (“CTAs”) to

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